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October 19, 2001

BY FAX AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D. Robert Lohn
Regional Administrator
National Marine Fisheries Service
7600 Sandpoint Way, NE
Seattle, WA 98115

Anne Badgely
Regional Director
U.S. Fish & Wildlife Service
911 NE 11th Ave.--
Portland, OR 97232-4181

Re: Delisting Petition

Dear Mr. Lohn and Ms. Badgely:

I write on behalf of seven individuals to petition, pursuant to 16 U.S.C. § 1533 and 50 C.F.R. § 424.14,¹ for the removal of "Southern Oregon/Northern California Coast coho salmon" (SONCC coho) from "threatened" status, and the removal of shortnose sucker and Lost River sucker from "endangered" status, under the Endangered Species Act.

Southern Oregon/Northern California Coast Coho Salmon

With the largest salmon runs observed this year since dam counts began in 1938, the time is ripe for reconsidering application of the Endangered Species Act to Pacific salmon stocks generally, and the best scientific and commercial data that must be considered in connection with this delisting petition include substantial increases in SONCC coho runs. See 50 C.F.R. § 424.11(d)(2).

¹ Pursuant to 50 C.F.R. § 424.14(a), the undersigned states that he is an attorney for the petitioners Walt Moden, 4747A South 6th St., Klamath Falls, OR 97603, (541) 883-3781; Dave Victorine, 28211 Stateline Rd., Malin, OR 97632, (541) 723-3955; Merle Carpenter, 3857 Boardman Ave., Klamath Falls, OR 97603, (541) 884-8615; Charles Whitlatch, 14600 Homestead Ln., Klamath Falls, OR 97601, (541) 884-2101; John Bair, 4960 Lombardy Ln., Klamath Falls, OR 97603, (541) 883-2953; Tiffany Baldock, 7249 Henley Rd., Klamath Falls, OR 97603, (541) 882-2722; and Dale Cross, 4027 Sardivant Ave., Klamath Falls, OR 97603 (541) 884-5336.

This petition focuses, in part, upon the lawfulness of the listing of SONCC coho under *Alsea Valley Alliance v. Evans*, No. 99-6265-HO (Sept. 10, 2001), and in particular the lawfulness of NMFS' treatment of hatchery fish. Judge Hogan's opinion establishes the following propositions of federal law:

- The National Marine Fisheries Service (NMFS) has determined "distinct population segments" (DPSs), the smallest units of fish and wildlife eligible for protection under the Act, through designation of "evolutionarily significant units" (ESUs). (Slip op. at 15.)
- NMFS may not protect DPSs smaller than the larger ESUs containing hatchery stocks, and may not include hatchery stocks within the ESUs, yet exclude them from the listings. (Slip op at 16-17.)
- NMFS may not redefine the ESUs to include only "natural"² stocks, omitting hatchery stocks, because hatchery and "natural" stocks are the same species and interbreed when mature, are not reproductively isolated in that they "share the same rivers, habitat and seasonal runs", because hatchery spawned salmon constitute very substantial portions of the ESUs, and because "NMFS considers progeny of hatchery fish that are born in the wild as 'naturally spawned'" and worthy of listing.³ Petitioners note that the United States Court of Appeals for the Ninth Circuit has previously acknowledged the "impossibility" of distinguishing "natural" from hatchery stocks.⁴
- NMFS does retain the option of broadening listing protections under the Act to include all "natural" and hatchery stocks within an ESU, to the extent that the best scientific and commercial data support the "threatened" or "endangered" risk status of the ESU *as a whole*. As set forth below, no such case can be made.

These propositions, establish that the SONCC coho listing was and is contrary to law. See 50 C.F.R. § 424.11(d)(3).

NMFS' May 6, 1997 Federal Register notice "concluded that fish from four California hatchery populations (Mattole River, Eel River, Trinity River, and Rowdy Creek) and Oregon's Rogue River hatchery stock should be included within the definition of this ESU". 62 Fed. Reg. 24,588, 24,608 (May 6, 1997). NMFS had previously concluded in a September 1995 "Status Review" that "[t]he main stocks in this region (Rogue River, Klamath River, and Trinity River) are heavily influenced by hatcheries". (Status Review at 128.)

² While Judge Hogan's opinion did not so hold, for most of the relevant "species", the very concept of "natural" stocks is itself arbitrary, capricious and contrary to law because salmon straying and hatchery operations have effectively eliminated any truly "natural" stocks.

³ Though Judge Hogan's observations on these factual points were directed to Oregon coastal coho salmon, as set forth below, the same observations apply to the SONCC coho.

⁴ *PNGC v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("it is impossible to enforce the [Endangered Species Act's prohibition against] trade and transport [of protected fish] . . .").

Nevertheless, when NMFS listed the fish, it defined the class subject to protection as "threatened" as:

"Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*). Includes all coho salmon naturally reproduced in streams between Cape Blanco in Curry County, OR, and Punta Gorda in Humboldt County, CA."

62 Fed. Reg. at 24,609.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified, by omitting at least five hatchery stocks. NMFS has also failed to assess risk to this ESU taking account of risks to hatchery populations.

Petitioners note that NMFS has long been aware of gross defects in the SONCC coho listing through evidence developed in *United States v. Grants Pass Irrigation District*, No. 98-3034-HO. Among other things, while the Federal Register notice declares that this ESU is "currently numbering fewer than 10,000 naturally-produced adults", 62 Fed. Reg. at 24,608, in fact the naturally-produced adults in a single river within this ESU, the Rogue River, number more than 20,000.⁵

Apparently lacking agency expertise on the true status of SONCC coho, NMFS submitted testimony in the *Grants Pass* case from a State of Oregon biologist, Michael Evenson. He testified under oath that the SONCC coho were "unlikely" ever to become endangered, and agreed that "there is no way that these fish will become extinct in the foreseeable future".⁶ Another biologist whose testimony was put forth by NMFS could not imagine the SONCC coho going extinct other than through "Mount McLaughlin blowing up. National crisis. A great depression."⁷

NMFS acknowledged that the presence of multiple populations within the SONCC coho ESU "may provide some buffer against the ESU's extinction". 62 Fed. Reg. at 24,590. In fact, properly specified metapopulation models of extinction risk for the SONC coho population would demonstrate no extinction risk whatsoever. Such models (including those mentioned in the papers cited in the Status Review) are among the "best available scientific and commercial data" NMFS should have utilized long ago, but did not.

Klamath Basin Suckers

The U.S. Fish and Wildlife Service determined "endangered" status for the shortnose sucker (*Chasmistes brevirostris*) and Lost River sucker (*Deltistes hexatus*) in 1988. 53 Fed.

⁵ Second Declaration of Steve Cramer, filed May 12, 1998, ¶ 28.

⁶ Evenson Deposition Transcript at 56, 64-66 (emphasis added; Mr. Evenson's remarks refer to Rogue River coho, but the risk to the *entire* SONCC ESU must be even less).

⁷ Satterthwaite Deposition Transcript at 47 (again, he refers to Rogue River coho).

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Reg. 27,130 (July 18, 1988). The petitioners note that the Secretary is under a duty, pursuant to 16 U.S.C. § 1533(c), to "conduct, at least once every five years, a review of" all listed species to determine, among other things, "whether such species should be removed from the list". To the best of petitioners' knowledge, the Secretary has failed and refused to comply with such law.

Had the Secretary done so, the Secretary would have determined that the information used by the USFWS to list the two sucker species as endangered under was at least erroneous, if not fraudulent. Dave Vogel, a fisheries scientist who spent 14 years with the U. S. Fish and Wildlife Service, testified at the U. S. House of Representatives field hearings in Klamath Falls on June 16, 2001 that "[t]he USFWS so selectively reported the available information that it can only be considered a distorted view of information available to the agency at that time".⁸

In any event, the listings provoked extensive research on these populations, which have provided better population abundance estimates for both species. As Mr. Vogel testified, the sucker populations exceeded the original estimates used to justify listings by an order of magnitude. Moreover, "in contrast to the lack of recruitment described in 1988, it is now very evident that the Upper Klamath Lake sucker populations have experienced substantial recruitment in recent years and also exhibit recruitment every year". And "the geographic range in which the suckers are found in the watershed is now known to be much larger than believed at the time of listing".

This data has long been available to USFWS. As Mr. Vogel explained, it was obvious that the listing data (or assumptions) were in error just "three years after the sucker listing". Mr. Vogel charitably suggests that either "the estimates of the sucker populations in the 1980s were in error and did not, in fact, demonstrate a precipitous decline (i.e., the populations were much larger than assumed)" or "the suckers have demonstrated an enormous boom in the period since the listing and no longer exhibit 'endangered' status". Either way, federal law requires that the suckers be de-listed. See 50 C.F.R. § 424.11(d)(2) & (3).

Conclusion

The federal government has no lawful role in the management of Klamath Basin suckers or SONCC coho. That role is Constitutionally charged to the Region's states and Native American Tribes. Indeed, the federal government can and should withdraw entirely from attempting to control fishery management through the Endangered Species Act, restoring that role to the Region's states.

The federal government has far more pressing business than micromanagement of Northwest fish populations, and its unlawful extensions of federal authority in these and other

⁸ Mr. Vogel's testimony is available at <http://resourcescommittee.house.gov/resources/107cong/fullcomm/2001june16/vogel.htm>. Petitioners hereby incorporate that testimony, the scientific studies cited in it, and indeed the entire administrative record in connection with post-listing administrative and legal proceedings concerning the suckers as additional supporting data for this petition.

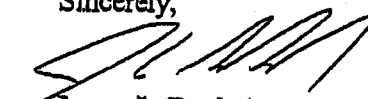
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areas threaten to turn the federal government into a jack of all trades, but master of none. We ask that you serve our Nation's interests by faithfully executing the law and removing SONCC coho and the suckers from the list of "threatened" and "endangered" species, as part of a necessary effort to redirect federal resources upon issues of genuinely national concern.

This letter also constitutes notice, pursuant to 16 U.S.C. § 1540(g), of the intent of the petitioners to pursue any and all legal remedies available under the Act or otherwise to compel your faithful discharge of your duty to remove these "species" from the list. Petitioners reserve the right to enter litigation to ensure appropriate and lawful actions on the part of NMFS and USFWS.

Pursuant to 16 U.S.C. § 1533(b)(3)(A), you have ninety days to offer a substantive response to this petition for delisting.

Sincerely,



James L. Buchal

Copies by Certified Mail, Return Receipt Requested to:

Secretary of Commerce
Secretary of Interior
Attorney General

Copies by Fax and First Class Mail to:

Governor Locke
Governor Kitzhaber
Governor Martz
Governor Kempthorne
Senator Murray
Senator Cantwell
Senator Smith
Senator Wyden
Senator Baucus
Senator Burns
Senator Craig
Senator Crapo
Congressman DeFazio
Congresswoman Hooley
Larry Cassidy, Chair, Northwest Power Planning Council